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SUPREME COURT OF THE

OCTOBER TERM, 1950

Consolidated Motor Transport, Inc., a Corporation, Petitioner,

vs.

Interstate Power Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

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In the

Supreme Court of the United States

October Term, 1950.

MacArthur Mining Company, Inc., a Corporation,
Petitioner,

vs.

Reconstruction Finance Corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS, EIGHTH CIRCUIT.

No. ———.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, MacArthur Mining Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above entitled case.

Opinions Below.

The opinion of the Court of Appeals was entered November 6, 1950 (R. 492) (184 F. 2d 913).

The opinion of the District Court was entered November 22, 1949 (R. 453) and is reported in 87 F. Supp. 211.

Jurisdiction.

The judgment of the Court of Appeals for the Eighth Circuit was entered on November 6, 1950 (R. 502). The jurisdiction of this Court is invoked under Sec. 1254 of Title 28 of the United States Code.

Questions Presented.

Question 1. Whether the opinion of the Court of Appeals in this case prejudicially ignores the controlling rule established by the case of *Kiefer & Kiefer* v. *Reconstruction Finance Corporation et al.,* 306 U. S. 381, wherein this Court held that the Reconstruction Finance Corporation may sue and be sued and that a suit against the Reconstruction Finance Corporation is not a suit against the United States to which the United States had not given its consent.

Question 2. Whether the opinion of the Court of Appeals in this case and the opinions of the Court of Appeals, District of Columbia Circuit, *Story* v. *Snyder, et al.,* 184 F. (2d) 454, and the opinion of the Court of Appeals for the First Circuit, *Atlantic Meat Company* v. *Reconstruction Finance Corporation,* 166 F. (2d) 50, are, prejudicially to petitioner, in irreconcilable conflict with the controlling rule announced in the case of *Kiefer & Kiefer* v. *Reconstruction Finance Corporation et al.,* 306 U. S. 381, with respect to the power and right of the Reconstruction Finance Corporation to sue and be sued.

Question 3. Under the War Power Acts of Congress does the President of the United States have the right and power to do that which he did in this case, namely,

issue a directive to the mining industry upon which said industry relied; and is that directive a valid contractual obligation?

Question 4. Is the Act of Congress specifically removing the acquisition and production of strategic and critical materials, in which category lead and zinc are placed, from the jurisdiction of the Price Administrator and the provisions of the Emergency Price Control Act to be given effect, or is said congressional action to be ignored as it was by the Court of Appeals in this case?

Question 5. Does the Emergency Court of Appeals have sole jurisdiction of a question involving contractual obligations of the Reconstruction Finance Corporation as was held by the Court of Appeals in this case, or is that a matter within the jurisdiction of the District Court as was held by the District Court in this case?

Question 6. Is the Reconstruction Finance Corporation an agency of the United States within the meaning of Rule 73(a) of the Federal Rules of Civil Procedure providing for time within which an appeal may be taken to the Court of Appeals from the District Court or is it in the same status as any ordinary litigant as held by this Court in *Reconstruction Finance Corporation* v. *The J. G. Menihan Corporation,* 312 U. S. 81?

Statutes Involved.

First War Powers Act, 50 U. S. C. A., Appendix 611.

Second War Powers Act, 50 U. S. C. A., Appendix 633.

Reconstruction Finance Corporation Act of 1932, as amended, Section 5d (15 U. S. C. A. 606b).

Joint Resolution of June 30, 1945 (59 Stat. 310).

50 U. S. C. A., Appendix 923.

50 U. S. C. A., Appendix 902(e).

50 U. S. C. A., Appendix 924(a)(d).

STATEMENT.

This suit is for breach of contract on the part of the Reconstruction Finance Corporation. The legality of this contract is to be found in Section 5d of the Reconstruction Finance Corporation Act of 1932, as amended, 15 U. S. C. A. 606(b), wherein Congress specifically authorized the Reconstruction Finance Corporation to create the Metals Reserve Company to deal in strategic metals for National Defense (R. 22).

Petitioner was incorporated in 1942, subsequent to and because of Pearl Harbor. At that time it became apparent to the United States Government that its reserves for copper, lead and zinc were dangerously low for the successful prosecution of a World War. The big problem was production, particularly from the so-called Tri-State District, which district comprised segments of the states of Missouri, Kansas, and Oklahoma and from which district a substantial portion of the zinc and lead output of the United States had been produced. However, the depletion of the mines of their richer ores had reduced the mines of this district in large part to a marginal character. By marginal mines is meant that the recovery of lead and zinc per ton of rock mined so nearly approximates or in most cases exceeds the cost of production that it is impracticable for a private operator to market these metals except at a loss. (Defendant's Admission, R. 22.)

In order to encourage private operators to produce these vitally needed metals, the Reconstruction Finance Corporation agreed to assist by the making of loans and the Premium Price Plan was evolved as an administrative agency for this purpose. As stated in the release of the Office of Economic Stabilization, March 28, 1946, "The Premium Price Plan is a subsidy system which has been in operation since February, 1942. Its primary purpose

was to obtain production of critically needed non-ferrous metals by compensating for abnormal costs in the production of marginal ores." The authority under which the plan functioned was established in the Reconstruction Finance Corporation Act of 1932, as amended, which provided among other things that Reconstruction Finance Corporation might create corporations to deal in strategic and critical materials or to take such other action as the President and the Federal Loan Administrator might deem necessary to expedite the national defense program. Metals Reserve Company (a wholly owned subsidiary of the Reconstruction Finance Corporation) was such a corporation and it was with funds provided to Metals Reserve Company by Congress that the plan was financed (the Metals Reserve Company was dissolved and all of its assets and liabilities were transferred to and assumed by Reconstruction Finance Corporation by act of Congress in 1946. U. S. C. A. 601 note.) (Defendant's Admission, R. 22.)

In accordance with the aforesaid policy, the Reconstruction Finance Corporation agreed and did loan to your petitioner the sum of $125,000.00 for the purpose of developing an ore body in the Tri-State District. (In order to show the good faith of petitioner in this case it is a matter of record that the entire sum loaned by the Reconstruction Finance Corporation has been repaid although, in order to make such repayment, approximately 59,567 tons of ore-producing rock were devoted to this purpose by petitioner which were not covered by the Reconstruction Finance Corporation mortgage) (R. 90, 98, 99). However, due to the increasing costs of labor, the inefficiency of manpower due to the military requirements and the expense of continually pumping thousands of gallons of water per minute in order to make production possible, it became apparent, in the spring of 1943,

to petitioner that further operation with the subsidies as granted to petitioner under the Premium Price Plan would be impossible (R. 94, 95). (The inadequacy of these subsidies had been a matter of continual protest on the part of your petitioner.) (R. 110, 118.) Said protests are admitted. Before making a definite decision on this point, however, the president of your petitioner made a trip to Washington and conferred with representatives of the Reconstruction Finance Corporation and it was at this time that the Presidential Directive (Exhibits A and B attached to and made a part of the petition) (R. 13, 65) was called to his attention, and he was informed by an officer of the Reconstruction Finance Corporation that, in view of said Directive, he should continue his operation and he definitely would receive a fair margin of profit (R. 95). The Premium Price Plan of which the Metals Reserve Company was the governing body and the fiscal agency was the agency empowered and required to carry out this Directive (R. 121) (122). As the Honorable Harold Judson, Assistant Solicitor General of the United States, states: "The Presidential Directive was an authoritative statement of the policy of the Executive to be applied by the Executive Agencies of the Government to the full extent of their legal powers." (See Exhibit D attached to and made a part of the petition) (R. 19). Metals Reserve Corporation failed entirely to carry out, in fact or in spirit, this Directive, although it had the legal power and congressional mandate to do so by Act of Congress in its very creation.

In reliance on said Directive, petitioner continued its operation and during the years 1943 and 1944 (the period herein complained of) produced 223,131 tons of ore-producing rock for the war effort. However, despite continuous protests, orally and in writing, by petitioner as to the inadequacy of the subsidies allowed by the admin-

istrative agency of the Premium Price Plan in the light of the Presidential Directive, petitioner was caused to suffer a net loss of 19c per ton of rock mined (R. 111), although the uncontroverted evidence at the trial showed that petitioner was entitled to a fair margin of profit of $1.25 per rock ton and the trial court so held.

It is the position of petitioner that the Presidential Directive constituted a commitment to petitioner that subsidies would be established which would result in a fair margin of profit and that said Directive constituted a binding contract between petitioner and Reconstruction Finance Corporation through its subsidiary Metals Reserve Company. Petitioner states that it has fully performed its part of said contract by the production of large quantities of the vitally needed lead and zinc, but that Reconstruction Finance Corporation has refused and continues to refuse to make adequate payment for same as is its legal duty so to do.

The point is this: The Act of Congress amending the Reconstruction Finance Corporation Act of 1932 and creating Metals Reserve Company required Metals Reserve Company to take such action with relation to strategic and critical materials as the President might deem necessary. Despite this congressional mandate, the facts indisputably show that Metals Reserve Company chose to ignore the Presidential Directive, although legally bound to comply with its provisions, and that, as a result, petitioner suffered a loss of $296,681.77 for which judgment was entered (R. 454).

As stated in the Report of the Senate Subcommittee, Print No. 8, page 81, in the Report of the Subcommittee on Mining and Minerals Industry to the Special Committee to Study and Survey Problems of American Small Business, dated February 1, 1946:

> "The authority under which the plan functions was established in the Reconstruction Finance Corporation Act of 1932, as amended, which provided among other things that there might be created corporations to deal in strategic and critical materials or to take such other action as the President and the Federal Loan Administrator might deem necessary to expedite the national defense program. Metals Reserve Company is such a corporation and it is with funds provided to MRC by Congress that the plan is financed."

The opinion of the Honorable John C. Collet, then Acting Stabilization Administrator (Exhibit C attached to the petition, R. 14), wherein he reviewed and approved the position of your petitioner, held that the Presidential Directive constituted a "commitment" to your petitioner that quotas and premiums would be established which would result in a fair margin of profit.

Concisely: the President of the United States, through and by virtue of his War Act Powers, granted unto him by Congress for the effective prosecution of the war, stated to petitioner: If you will produce the critically needed lead and zinc required for the successful prosecution of this war, Metals Reserve Corporation (whose assets and liabilities were by Congress transferred to Reconstruction Finance Corporation (R. 22)), will pay you a fair margin of profit. This, Metals Reserve did not do.

The Reconstruction Finance Corporation does not challenge the fact that the MacArthur Mining Company substantially produced the vitally needed lead and zinc; nor does it challenge the fact that MacArthur Mining Company not only did not receive a fair margin of profit but in fact lost 19c per rock ton mined (R. 111); its only defense is concisely summed up by the District Court in

its opinion on Reconstruction Finance Corporation's challenge as to the jurisdiction of the Court (82 F. Supp. 455, l. c. 458) wherein Judge Reeves stated:

> "It should be kept in mind that, if the averments of the plaintiff are true, it sustained heavy losses in its efforts to provide the government with strategic and critical materials in a time of war. In doing so, it had been assured of subsidies to protect it against losses and to afford a fair margin of profit. In its effort to recover its claimed losses it is challenged by counsel for the government as having failed to bring itself within such provision of law that would enable it to secure an adjudication on the merits of its claim. The plaintiff is confronted with a wilderness of ukases, directives and regulations, many of which are designed to defeat recovery and to accomplish forfeitures. As nature abhors a vacuum, so does the law abhor a forfeiture. Not only should a benign and benevolent sovereign hold itself always in readiness to meet fairly and honestly its obligations and the just claims of its subjects but the judges should be alert to protect a litigant against defeat of a claim if meritorious and just.
>
> The foregoing should be a postulate to the consideration of every case where, as here, the government is involved and the rights of the claimant are hedged about with confusing regulations."

The position of petitioner is unique in comparison with other producers in that it continually protested against the quotas assigned to it. In addition it was advised (R. 16) on December 30, 1943, by Director of the Metal Mining Analysis that it would be well to wait until the cost and revenue situation was stabilized at full production before considering an operation report submitted in connection with claims for more favorable quotas and additional premiums.

In other words, a decision in this case favorable to your petitioner does not involve reopening quotas definitely closed by acceptance and lack of protest on the part of other producers. This is made clear by the opinion of the Honorable John C. Collet (R. 18) wherein he held that in view of the continued protests by your petitioner as to the inadequacy of the quotas established and premiums paid and the further fact that your petitioner was advised by the Director of the Metal Mining Analysis to wait until the cost and revenue situation was stabilized at full production before considering an operating report submitted in connection with claims for more favorable quotas and additional premiums, a review of the quotas established and premiums paid should be done and could be done without committing the government to a policy of reopening quotas definitely closed.

SPECIFICATIONS OF ERROR TO BE URGED.

The Court of Appeals for the Eighth Circuit erred:

1. In holding that this action is one against the United States to which the government has not consented to be sued.

2. In holding that the Directive of the President of the United States, issued under his congressionally authorized War Powers, did not constitute a contract between petitioner and the Reconstruction Finance Corporation.

3. In holding that the Emergency Court of Appeals had exclusive jurisdiction.

The Opinions of the Court Below.

The opinion, findings of fact and judgment of the District Court awarding to your petitioner the sum of $296,681.77 representing damages for breach of contract on the part of the Reconstruction Finance Corporation appear in the record filed herein (R. 450-455).

The opinion and judgment of the Court of Appeals also appears in the record (R. 492) (502).

Because of the importance of the case, not only to your petitioner but to the public, an extended motion for rehearing consisting of 29 pages was filed on November 29, 1950, copies of which were mailed by the Clerk of the Court to the Judges who heard the case, none of whom were then in St. Louis, Missouri. The petition for rehearing was overruled on December 5, 1950.

Reasons for Granting the Writ.

1. The decision of the Court of Appeals in holding that this cause is a suit against the United States to which action the United States had not given its consent is in irreconcilable conflict with the leading case of *Kiefer & Kiefer* v. *Reconstruction Finance Corporation, et al.*, 306 U. S. 381.

The Court as a basis for its opinion cited the cases of *Ex parte New York,* 266 U. S. 490, 500, and the case of *Land* v. *Dollar,* 330 U. S. 731.

The clear, legal and apparent distinction between cases such as the New York case and the Land case and cases involving governmental corporations endowed by Congress with the right to sue and be sued is concisely stated in the recent case of *Story* v. *Snyder, et al.,* 184 F. (2d) 454, decided by the United States Court of Appeals, District of Columbia Circuit.

In that case, the Court had before it the question of whether the "Library of Congress Trust Fund Board is subject to suit in the District Court for the District of Columbia, on a cause of action alleged to have risen in connection with the administration of the Board's duties."

The Court found that, under the statute which controlled the Trust Fund, the suit was one against the United States, and cited the *Land* v. *Dollar* and the *Ex parte* New York cases in support.

However, in distinguishing the Trust Fund case and the Land and New York cases from cases involving corporations such as Reconstruction Finance Corporation endowed by Congress with the power to "sue and be sued," the Court stated:

> "Where Congress has authorized the formation of a business corporation, to be owned and operated by the Government, and has empowered it to 'sue and be

sued,' consent to maintenance and defense of suit has been found. See *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381, 59 S. Ct. 516, 83 L. Ed. 784. The reasoning of such cases is, of course, readily distinguishable from the present situation. Here there is no general 'sue and be sued' clause, but instead, a limited grant of jurisdiction. Nor was the defendant Board ever 'launched * * * into the commercial world' within the meaning of the cases under reference. See *Federal Housing Administration, Region No. 4,* v. *Burr,* 309 U. S. 242, 245, 60 S. Ct. 488, 490, 84 L. Ed. 724. And whether or not sovereign immunity should be applied, as a matter of policy, is no longer an open question. While the rule has been the subject of considerable criticism (*R. F. C.* v. *J. G. Menihan Corp.,* 312 U. S. 81, 61 S. Ct. 485, 85 L. Ed. 595; *Kenecott Copper Corp.* v. *State Tax Commission,* 327 U. S. 573, 580, 581, 66 S. Ct. 745, 90 L. Ed. 862 (Frankfurter, J., dissenting); *Keifer & Keifer* v. *R. F. C., supra,* 306 U. S. at pages 390-391, 59 S. Ct. at pages 518-519), it is too firmly entrenched in our system of law to be discarded by judicial fiat. It has been an assumed premise upon which much legislation has been predicated."

In the case of *Lawrence Warehouse* v. *Defense Supplies Corporation,* 168 F. (2d) 199 (a corporation similar to Metals Reserve Company) the Court said, l. c. 205:

> "However, we do not agree that the United States is the real party litigant when the Reconstruction Finance Corporation is sued or being sued."

As stated by Judge Gardner in the case of *Gaynor* v. *Metals Reserve Company,* 166 F. (2d) 1011, in speaking of the Act of Congress whereby Reconstruction Finance Corporation assumed all the liabilities of Metals Reserve

Company whether arising out of contract or otherwise, l. c. 1014:

> "It was not the intention of Congress to repudiate any just debt or liability theretofore incurred."

In the case of *Seven Oaks* v. *Federal Housing Administration,* 171 F. (2d) 947, the Court, in construing the "sue and be sued" clause, stated:

> "* * * The will of Congress that the Housing Administration be subject to suit in the same way as other federal corporations dealing with the public seems sufficiently clear * * *."

In support of its opinion on this point the Court of Appeals also cites the case of *Atlantic Meat Company* v. *Reconstruction Finance Corporation,* 1 Cir., 166 F. (2d) 50-56. This decision is likewise in irreconcilable conflict with the Keifer case and your petitioner has no doubt but what had that case been presented to this Court by petition for certiorari the Court of Appeals for the First Circuit would have been overruled on this point. However, the decision of the First Circuit was never presented to this Court for consideration and as a consequence the Court of Appeals in this case has been led into error.

It is particularly difficult to understand the Court of Appeals' for the Eighth Circuit opinion on this point when, in a recent opinion dated December 15, 1950, it *upheld* the doctrine of the Keifer case and in effect overruled its opinion in the case at bar.

This recent opinion was a *per curiam* decision rendered on a motion for rehearing in the case of *Reconstruction Finance Corporation* v. *Childers et al.,* Court of Appeals, No. 14094—not yet officially reported. In that opinion, the court stated in response to the Recon-

struction Finance Corporation's contention that, as a public corporation, it was not responsible for the mistakes of its agents:

> "In substance this is a challenge to the jurisdiction of the court predicated upon immunity of the government and its agencies. Such immunity was waived in the Act of Congress creating the Reconstruction Finance Corporation, which provides: "It (R. F. C.) shall have power * * * to make contracts; * * * to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; * * *" 15 U. S. C. 603, 1946 Supp., 15 U. S. C. A. 603 (a).
>
> The statute does not state expressly that a party against whom the Reconstruction Finance Corporation brings suit may appear and defend; but such right is implied. To hold otherwise would violate the due process clause of the 14th Amendment; for it would sanction the breaking of a contract by the Reconstruction Finance Corporation with a citizen and the taking of his property by aid of the court without a hearing. And since he may defend, the rules governing the trial and decision are the same as they would be in a case where both parties are private citizens. *Keifer & Keifer* v. *R. F. C.*, 306 U. S. 381; *F. H. A.* v. *Burr*, 309 U. S. 242; *R. F. C.* v. *Menihan Corp., et al.*, 312 U. S. 81.
>
> The motion for rehearing will accordingly be dismissed."

Consequently, in view of the conflict between the opinions of the Courts of Appeal for the First Circuit and the Eighth Circuit and the conflict in the Eighth Circuit itself, with the doctrine as announced in the Keifer case and the additional conflict between the Circuits as evidenced by the decision in the District of Columbia Circuit (*Story* v. *Snyder et al.*, 184 F. (2d) 454), it is of the utmost public interest that this Court

by granting this petition for certiorari reannounce once and for all, to the Courts and to the people, that the doctrine of the Kiefer case is still the law of the land and that governmental corporations endowed by Congress with the right to sue and be sued may be sued in any Court of competent jurisdiction and that the defense that such an action is in effect one against the United States, to which the United States has not given its consent, is spurious and of no legal effect.

2. This is a suit on contract—a contract not only possessing all of the legal attributes required of a contract but also one affected with the deepest public interest. The issue is: Did the President of the United States under Congressional War Power Acts have the right to make a binding and legal offer to an industry for the production of critical metals?

In the case of *Lichter* v. *United States,* 334 U. S. 742, the Court, in reviewing some of the administrative efforts to speed production in World War II, said:

> "The above mentioned excerpts describe a demand for production of war supplies in proportions previously unimagined. They call for production in a volume never before approximated and at an undreamed of speed. The results amply demonstrated the infinite value of that production in winning the war. It proved to be a *sine qua non* condition of the survival of the nation."

As stated in the message of the President to the Congress upon the State of the Union, January 6, 1942:

> "• • • Production for war is based on metals and raw materials—steel, copper, rubber, aluminum, zinc, tin. • • •"

Your petitioner believed that the President did have that authority and accepted the offer by the production of vitally needed lead and zinc (R. 96) (R. 65).

The Honorable Harold Judson, Assistant Solicitor General of the United States, believed that the President had that authority when he stated that the Presidential Directive was binding on all administrative agencies of the government (R. 19).

The Honorable John Caskie Collet, when acting as Stabilization Administrator, believed that the President had that authority when he termed the Presidential Directive a commitment to your petitioner (R. 14).

The *only* denial of the contractual validity of this Directive is by counsel for Reconstruction Finance Corporation and this in spite of the fact that the R. F. C.'s subsidiary, Metals Reserve Company, whose only reason for Congressional corporate existence was to deal in the production and acquisition of critical and strategic metals affirmatively recognized, by the payment of Congressionally authorized millions of dollars, the right, obligation and duty of the President of the United States to issue the Directive which your petitioner states constitutes a valid offer to it which was consummated into a valid contract by full performance.

As has been said by this Court, in the case of *United States* v. *Chemical Foundation,* 272 U. S. 1, in speaking of an executive order of the President under the Trading With the Enemy Act of 1917:

> "Obviously, all the functions of his great office cannot be exercised by the President in person."

At the time the President issued his Directive he knew that Congress had already created the Metals Reserve Company and he knew that the very act which created

the Metals Reserve Company required it to deal in the production and acquisition of critical and strategic metals in such manner as he, the President, might direct. This "chain of title" is recognized by the Assistant Solicitor General when he stated that the Directive was binding on all administrative agencies of the government.

The Court of Appeals, however, dismisses this Directive as a mere statement of policy.

If that decision is to stand, then it is fair to state that all executive orders which controlled and which were judicially enforced governing the economy and lives of our people were mere statements of policy and could not therefore have been legally enforced.

That, of course, is an absurdity, for the war powers of Congress are practically unlimited. As stated in *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253, l. c. 262:

> "* * * the Congress and the President exert the war power of the nation, and they have wide discretion as to the means to be employed successfully to carry on."

Your petitioner asserts that the Presidential Directive herein involved had the force and effect of law and as such it was the lawful and legal duty of the Metals Reserve Company to pay to your petitioner "a fair margin of profit" guaranteed by that Directive. This, Metals Reserve Company did not do and the record does not challenge this fact. The legal import of an executive order issued under the War Powers Acts is stated in the case of *Bradley* v. *The American Radiator and Standard San. Corp.*, 6 F. R. D. 37:

> "On December 18, 1941, Congress enacted the First War Powers Act, 50 U. S. C. A., App. 611, 55 Stat. 839, empowering the President to authorize any

> department, or agency, of the government exercising funds in connection with the prosecution of the war effort to enter into contracts whenever he deemed such occasion would facilitate the prosecution of the war. Pursuant to this authorization and by Executive Order 9001, 6 F. Reg. 6787, the President authorized the War Department to enter into contracts in connection with the prosecution of the war. • • • Executive Order 9001 promulgated by the President pursuant to the authority delegated to him by Congress *has the effect of a statute and is 'part of the law of the land.' Givens* v. *Zerbst,* 255 U. S. 11, at page 18, 41 S. Ct. 227, 228, 65 l. ed. 475; *Armstrong* v. *United States,* 80 U. S. 154, 20 l. ed. 614." (Emphasis ours.)

So, also, the Directive of the President in the instant case became the law of the land upon which your petitioner had a right to rely.

The Court of Appeals in passing upon the instant case has completely failed to construe the contract in the light of world conditions as they were at the time the contract was entered into. It has sought out and applied peacetime standards. We assert that such a construction is morally and legally wrong. In *Brown* v. *Bernstein,* 49 Fed. Sup. 728:

> "Executive orders and legislation during a national emergency and in time of war must be expressed in broad terms and generalities, and in the interpretation of such legislation the Court must not hunt for limitations nor scrutinize the wording with confining intent, but should seek for the purpose and the spirit of the enactment."

In *Miller* v. *Robertson,* 266 U. S. 243, the Court in speaking of a contract, the subject of a suit under the Trading With the Enemy Act of 1917, stated:

> "The intention of the parties is to be gathered * * * from the whole instrument read in the light of the circumstances existing at the time of negotiations leading up to its execution."

Reconstruction Finance Corporation does not question the power and right of the President to adopt and make public the minerals program submitted to him by Donald Nelson under the broad war powers given to the President by the Congress (Rec. 28). This program was prepared on order of the President by the War Production Board, members of Congress, interested agencies and representatives of the Mining Industry. Reconstruction Finance Corporation does not question the constitutionality of the grant of war powers in the First and Second War Powers Acts. The President had the power to do what he did. He made an offer to the mining industry amounting to a wartime appeal for essential production, which offer he made public. It was accepted by your petitioner and acted upon by your petitioner. There was recognition both in Washington and in the field by the Reconstruction Finance Corporation of the operation of petitioner and there was acceptance and part payment on the contract by the Metals Reserve Company through the Premium Price Plan for such operation. This petition seeks to recover what the Metals Reserve Company failed to do under the contract, and that was to give petitioner a "fair margin of profit" as the President's Directive ordered to be done. In other words, Metals Reserve Company did not carry out the law of the land.

As part and parcel of the construction of a contract, a cardinal principle is the intention of the parties. It was the intention and design of President Roosevelt, authorized by the Congress, to induce intensive production, especially by the operation of marginal mines. It

was the intention of the MacArthur Mining Company to accept the provisions of the contract offered by the Nelson program, which program was publicly adopted by President Roosevelt. The consideration on the one side was "a fair margin of profit" and on the other the expenditure of work and labor to the end of full production.

The Congress authorized the President of the United States to make the offer of contract which he made, which contract was accepted by the fullest performance upon the part of the petitioner.

3. The opinion of the Court of Appeals in holding that the Emergency Court of Appeals has exclusive jurisdiction of the subject matter of this action is erroneous in that its conclusion is based on a wrong premise. The opinion, following the erroneous theory of counsel for the Reconstruction Finance Corporation, has *assumed* that we are here assailing regulations and orders issued under the Emergency Price Control Act. *That is not a fact.*

The Premium Price Plan did not function under the Emergency Price Control Act. As we have heretofore pointed out in our statement, page 5 of this petition, the authority for the plan was established in the Reconstruction Finance Corporation Act of 1932 as amended. That this is true is so specifically and definitely recognized and provided by Congress in Section 2(e) of the Emergency Price Control Act that there should be no fair question about it. That Act provides:

> "That in the case of any commodity which has heretofore or may hereafter be defined as strategic or critical material by the President of the United States pursuant to Section 5d of the Reconstruction Finance Act, as amended, such *determination shall be made by the Federal Loan Administrator, with*

*the approval of the President, and notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold or stored, and such subsidy payments * * * may be paid, only by corporations created or organized pursuant to such Section 5d * * *."*

The theory of opposing counsel is that inasmuch as the above exception with regard to metals *happens* to appear in the Price Control Act that therefore actions taken by Metals Reserve Company under Section 5d of the Reconstruction Finance Corporation Act necessarily were taken under the Emergency Price Control Act. This theory, of course, which was followed by the Court of Appeals, overrules the Act of Congress specifically providing for an exception in matters involving strategic and critical metals. In fact, the opinion of the Court of Appeals does not even mention the exception provided in Section 2(e) of the Emergency Price Control Act.

Under Section 204(a) of the Price Control Act a protest to the Price Administrator was made a prerequisite to the filing of a complaint with the Emergency Court of Appeals. In fact, this is apparent from the rules of that Court that the Court itself had determined it's own jurisdiction to be limited to matters involving the Price Administrator, and he alone. In the case at bar the metals program, having been removed from the jurisdiction of the Price Administrator, no appeals machinery whatever had been provided.

That none existed is shown by the Report of the Senate Subcommittee on Mining and Minerals under date of February 1, 1946. (Senate Subcommittee, Print No. 8.) We quote from the report, page 32:

"No appeals machinery, enabling producers to obtain independent reviews of and redress from de-

cisions of the Quota Committee, was established within the administrative framework of the Premium Price Plan. However, inasmuch as the Quota Committee applied unannounced rules and policies and as eligible producers seldom have been informed of the complete details surrounding denials or inadequate quota assignments, an appeals board probably would have been largely ineffective."

The Administrator of Price Control prescribed and duly published certain procedural regulations, but such regulations, as well as the authority and control of the Price Administrator, were without effect, meaning or binding or even permissive or colorable control over the production of lead and zinc ores and concentrates for the reason that strategic metals were not subject to his jurisdiction.

The Administrator of Price Control had no statutory authority whatever in the matter, either in making any order, in receiveng any protest or in ruling upon any protest involving lead and zinc ores and concentrates.

This principle is well stated in the case of *Defense Supplies Corp.* v. *Norwalk Tire & Rubber Co.*, 61 F. Supp. 252, l. c. 255:

"The Reconstruction Finance Corporation was created a body corporate on January 22, 1932, 15 U. S. C. A., Sec. 601. Its entire capital stock is owned by the United States. It was authorized by Section 606b(3), in order to enable the government in its national defense program, to create a corporation to acquire, carry, sell or otherwise deal in strategic or otherwise critical materials as defined by the President; and the powers of any corporation were to be set out in a charter, filed with the Secretary of the Senate and the Clerk of the House of Representatives. Admittedly plaintiff was so cre-

> ated and exists, and all of its capital stock is owned by the Reconstruction Finance Corporation.
>
> "The Office of Price Administrator is also a government agency, created originally under the name of Office of Price Administrator and Civilian Supply by executive order of the President, and later under the Emergency Price Control Act of 1942, 50 U. S. C. A. Appendix, Sec. 901 *et seq.* As such, it was authorized to utilize the services and facilities of other federal departments and agencies to the fullest extent compatible with efficiency. But neither under the executive order nor under the Emergency Price Control Act was it constituted an agent of the plaintiff. It was authorized to advise and make recommendations in respect to the purchase and acquisition of commodities, to formulate programs for the use of consumers' goods, fix maximum prices, and buy and sell commodities under certain conditions. But the Federal Loan Administrator was the one who should define what was a strategic or critical material, and such commodity could be bought and sold, stored or used, and payments made therefor, only by corporations organized and created under the Reconstruction Finance Corporation Act, subject only to the fixing by the O. P. A. of maximum prices."

The reason is found in the terms of Section 2(e) of the Price Control Act which expressly took from the control of the Administrator of Price Control and from the Price Control Act, all jurisdiction and authority over metals found by the President to be critical and strategic. As stated by the District Court in its opinion overruling the motion of the Reconstruction Finance Corporation to dismiss (R. 40):

> "It will be seen, therefore, that the subject matter of this action was completely taken out of the Emergency Price Control Act and transplanted in the exclusive sphere of the defendant's activities and

> under the law 'subsidy payments to domestic producers,' could be paid 'only by corporations created or organized pursuant to such section 5d,' etc. (section 609j of Title 15 U. S. C. A.)."

If the Administrator of Price Control had no authority, a protest to him would have been an utter vacuity, clearly not within congressional intent or any rule of law.

There is no provision for a protest to any other officer or agency.

Opposing counsel confuses the differences between metals and meats. By reason of statutory provisions and President Roosevelt's Directive of April 24, 1943, an entirely different course of treatment and consideration was made in the administration as to the critical metals program and other commodities program. Reconstruction Finance Corporation persists in citing meat cases and a coffee case, palpably and, in most cases, admittedly upon regulations issued pursuant to Section 2(e) of the Emergency Price Control Act and subject to protest under Section 203(a) of the Act and to review by the Emergency Court of Appeals, all of which have nothing to do with the present situation which concerns a contract respecting the production of critical metals alone and which was not subject to protest under any procedural regulation or to review by the Emergency Court of Appeals.

4. With respect to your Petitioner's position before the Court of Appeals that the appeal of the Reconstruction Finance Corporation from the District Court was not timely taken we shall limit our remarks to a brief summary in view of the fact that the Motion to Dismiss the appeal of the Reconstruction Finance Corporation

together with points and authorities will be forwarded to this Court as part of the record.

The facts are: Judgment was rendered in this cause in favor of Petitioner and against Reconstruction Finance Corporation in the sum of $296,681.77 on November 22, 1949. No motion for a new trial was filed by Reconstruction Finance Corporation, nor were there any proceedings had relative to appeal until 58 days following the rendition of the judgment at which time, to-wit, January 18, 1950, Reconstruction Finance Corporation filed Notice of Appeal. On January 20, 1950, Reconstruction Finance Corporation requested and obtained an order staying execution.

Your Petitioner submits that in view of the above facts the appeal of Reconstruction Finance Corporation from the District Court should have been dismissed by the Court of Appeals and in support thereof states:

a. Rule 73(a) of the Federal Rules of Civil Procedure governing the time for the filing of Notice of Appeal is mandatory and jurisdictional.

b. Rule 54(d) of these same Rules containing substantially the exact language of Rule 73(a) with respect to "the United States, its officers and agencies" has been construed by the Supreme Court in the case of *Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U. S. 81, as being not applicable to the Reconstruction Finance Corporation.

c. Rule 73(a) was promulgated subsequent to the decision of the Supreme Court construing the language in Rule 54(d) (*Reconstruction Finance Corporation* v. *J. G. Menihan Corp.*, 312 U. S. 81).

d. In promulgating Rule 73(a) the Supreme Court certainly took cognizance of its own construction of the language used in Rule 54(d).

e. Since the Supreme Court has construed the phraseology "the United States, its officers and agencies" in Rule 54(d) as not applicable to the Reconstruction Finance Corporation, it therefore inescapably follows that the same phraseology used in Rule 73(a) is also not applicable to the Reconstruction Finance Corporation.

f. That Reconstruction Finance Corporation stands in exactly the same position as any ordinary litigant with respect to conformance with the provisions of Rule 73(a) requiring Notice of Appeal to be filed within 30 days after the rendition of judgment.

g. That the exception in Rule 73(a) providing for Notice of Appeal within 60 days from the rendition of judgment in any case in which the United States, or an officer or agency thereof, is a party is not applicable in the case of Reconstruction Finance Corporation.

h. That no Notice of Appeal having been filed by Reconstruction Finance Corporation, within 30 days from the date of the entry of judgment in this cause, the Notice of Appeal filed by Reconstruction Finance Corporation on January 18, 1950, is null and void and of no force and effect, timely Notice of Appeal being mandatory and jurisdictional.

i. That no valid Notice of Appeal having been filed, said appeal of Reconstruction Finance Corporation should have been dismissed.

Conclusion.

This petition for certiorari is probably unique in that it presents to the Court six grounds for certiorari, any one of which is sufficient to warrant this Court taking jurisdiction because of their general importance to the public and to the bench and bar. Five of the points

pertain to jurisdiction. The sixth pertains to the War Time Powers of the President and their exercise as granted by Congressional action. Such War Powers are again strikingly before the Nation as we gird ourselves for what may prove to be a Third World War.

It is therefore, of the utmost public interest that the power of the President under Congressionally granted War Powers be defined by this Court.

It is your Petitioner's position that President Roosevelt's Directive with respect to the metals industry had the force and effect of law and, your Petitioner having accepted the offer by performance, is entitled to the fair margin of profit guaranteed by the contract.

Prayer.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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